

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
LEVEL 3 COMMUNICATIONS, LLC)
For Approval of Incurring Debt)
And Financing Obligations.)
_____)

DOCKET NO. 04-0356

DECISION AND ORDER NO. 21661

Filed Feb. 28, 2005
At 10 o'clock A.M.

Karen Higashi
Chief Clerk of the Commission

RECEIVED
2005 MAR -1 A 7:58
DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

OF THE STATE OF HAWAII

LEVEL 3 COMMUNICATIONS, LLC

Decision and Order No. **21661**

DECISION AND ORDER

December 9, 2004.

I.

Introduction

and 269-19.

CONSUMER AFFAIRS ("Consumer Advocate"). The Consumer Advocate

stated, in its Statement of Position, filed on January 25, 2005, ("Statement of Position") that it does not object to the commission waiving the requirements of HRS §§ 269-7(a), 269-17 and 269-19 with respect to the Proposed Financial Transactions, subject to one qualification, discussed below. In the alternative, the Consumer Advocate recommends commission approval of the Proposed Financial Transactions.

II.

Background

A.

Description of Subject Entities

Petitioner is a Delaware corporation that is presently authorized to provide resold intrastate telecommunications services in the State of Hawaii ("State").¹ Petitioner is a wholly-owned subsidiary of Parent, and Parent is, in turn, a wholly-owned subsidiary of Level 3 Communications, Inc., a publicly traded Delaware corporation ("Level 3"). All three companies maintain their principal place of business in Broomfield, Colorado.

B.

Proposed Financial Transactions

The Proposed Financial Transactions involve Parent entering into certain financial agreements affecting Petitioner.

¹Decision and Order No. 17053, filed on June 29, 1999, in Docket No. 99-0049.

In particular, Parent recently entered into a Credit Agreement in the aggregate principal amount of up to \$850 million. As part of the Credit Agreement, Parent and Petitioner agreed to enter into an arrangement with lenders whereby Petitioner would agree to pledge its assets located in the State and guarantee the Credit Agreement after obtaining the required regulatory approvals.² Petitioner represents that a portion of the proceeds from the Credit Agreement have already been used to reduce existing indebtedness that was previously secured by Petitioner.³

Petitioner represents that the above-described transactions (1) "will not increase the aggregate amount of debt that is secured by Petitioner's pledge of assets and guarantee"; (2) "will be entirely transparent to consumers" and "will not cause a change in the officers or directors of Petitioner"; and (3) "will not alter the rates, terms and conditions under which Petitioner provides service in Hawaii."⁴ Petitioner also asserts that the Proposed Financial Transactions will serve the public interest in promoting competition among telecommunications

²Petitioner emphasizes that although Parent has already entered into the Credit Agreement, none of Petitioner's obligations will apply until required regulatory approvals are obtained.

³Petitioner represents that a portion of the proceeds from the Credit Agreement were advanced to Petitioner in exchange for a new intercompany demand note ("Demand Note") and used by Petitioner to repay existing intercompany loans extended by Level 3 to Petitioner.

⁴Petition at 5.

carriers by providing Petitioner and Parent with the opportunity to strengthen their financial position.⁵

C.

Consumer Advocate's Statement of Position

As stated above, the Consumer Advocate states in its Statement of Position that it recommends that the commission waive the approval requirements of Petitioner's Petition.⁶ In support of this recommendation, the Consumer Advocate asserts:

Petitioner currently has no Hawaii facilities and for the past three years (i.e., 2001 to 2003) has not reported any intrastate revenues on the annual financial statements filed with the [c]ommission and Consumer Advocate. In addition, it appears that for 2004, the estimated intrastate revenues will be less than \$100,000. Thus, although it is not clear whether Petitioner provides only fully competitive services in the State, it is clear from the annual financial statement information that Petitioner is a non-dominant telecommunications carrier in Hawaii. In addition, Petitioner asserts that the [Proposed Financial Transactions] will serve the public interest by enabling it to bring competitive services to consumers in Hawaii's market. Since there are many telecommunications providers authorized to provide resale long distance service in the Hawaii market, it is assumed that competition will serve the same purpose as public interest regulation for the proposed financing affecting Petitioner.⁷

The Consumer Advocate also contends that the commission's waiver in this matter should extend to the applicable filing

⁵Id. at 5-6.

⁶The Consumer Advocate alludes that it is unsure as to whether HRS § 269-17 is triggered because the Petition fails to indicate whether the Demand Note is more than twelve (12) months. Consumer Advocate's Statement of Position at 3.

⁷Id. at 4-5.

requirements (i.e., copies of the financing documents) since "the need to review and maintain copies of the financing documents for record keeping purposes is eliminated if the need to review the financing transaction is waived."⁸

Finally, the Consumer Advocate states that it did not receive a copy of Petitioner's initial tariff required to be filed in accordance with Decision and Order No. 17053. Accordingly, it qualifies its recommendation for waiver in this matter by suggesting that Petitioner should be ordered to immediately file such tariff with the commission and the Consumer Advocate. If the tariff was filed with the commission, the Consumer Advocate requests that a copy be immediately filed with the Consumer Advocate in accordance with HAR § 6-61-21(b).

III.

Discussion

HRS § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations." Thus, the commission has jurisdiction to review the proposed financial transactions of the parent entity of a regulated public utility under HRS § 269-7(a). Under this section, the commission will approve the proposed financial

⁸*Id.* at 6.

transaction if it is reasonable and consistent with the public interest.⁹

HRS § 269-17 requires a public utility to obtain the commission's approval before issuing stocks and stock certificates, bonds, notes, and other evidences of indebtedness payable at periods of more than twelve (12) months. This section permits the proceeds of such debt to be used only for the acquisition of property or for the construction, completion, extension, or improvement of or addition to the utility's facilities or service, or for the discharge or refunding of its obligations or reimbursement of funds expended for the foregoing described purposes. Furthermore, "[a]ll stock and every stock certificate, and every bond, note, or other evidence of indebtedness of a public utility corporation not payable within twelve [(12)] months, issued without an order of the commission authorizing the same, then effect, shall be void." HRS § 269-17.

HRS § 269-19 requires a public utility corporation to obtain our consent prior to, among other things, mortgaging, encumbering, or otherwise disposing of its property. Similar to HRS § 269-17, HRS § 269-19 also states: "Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation, made other than in accordance with the order of the commission shall be void." HRS § 269-19.

⁹See, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.

Upon a review of the record, we find and conclude that the Proposed Financial Transactions fall under the purview of HRS §§ 269-7(a) and 269-19.¹⁰ However, HRS § 269-16.9 also permits us to waive regulatory requirements applicable to telecommunications providers if we determine that competition will serve the same purpose as public interest regulation. Specifically, HAR § 6-80-135 permits us to waive the applicability of any of the provisions of HRS chapter 269 or any rule, upon a determination that a waiver is in the public interest.

In this docket, we find, at this time, Petitioner is a non-dominant carrier in Hawaii. We also find that the Proposed Financial Transactions are consistent with the public interest, and that competition, in this instance, will serve the same purpose as public interest regulation. Thus, the commission concludes that the applicable requirements of HRS §§ 269-7(a), 269-17 and 269-19, to the extent applicable, should be waived with regards to the matters in this docket, pursuant to HRS § 269-16.9 and HAR § 6-80-135.¹¹ Similarly, based on these

¹⁰We agree with the Consumer Advocate that the record is unclear as to whether HRS § 269-17 is applicable in this matter. However, we do not find it necessary to make such determination in this instance in light of our ruling, discussed below, in this Decision and Order.

¹¹See also, Decision and Order No. 18454, filed on March 28, 2001, in Docket No. 00-0443. The commission will continue to examine each application or petition and make determinations on a case-by-case basis as to whether the applicable requirements of HRS §§ 269-7(a), 269-17 and 269-19 should be waived. The commission's determination, in the instant case, of the applicability of HRS §§ 269-7(a), 269-17 and 269-19 is based on our review of Petitioner's instant petition only. Thus, our waiver in this instance of the applicability of HRS §§ 269-7(a), 269-17 and 269-19 should not be construed by any public utility,

findings and conclusions stated above, we will also waive the provisions of HAR §§ 6-61-101 and 6-61-105, to the extent that Petitioner's Petition fails to meet any of these filing requirements.

Finally, although our records¹² indicate that Petitioner filed its initial tariff in Docket No. 99-0049 on July 26, 1999, it does not appear that copies of such tariff were submitted to the Consumer Advocate in accordance with HAR § 6-61-21(b). As such, the commission will require Petitioner to provide two (2) copies of such tariff and any revised tariff¹³ submitted thereafter to the Consumer Advocate in accordance with HAR § 6-61-21(b) within thirty (30) days of this Decision and Order.

IV.

Orders

THE COMMISSION ORDERS:

1. The requirements of HRS §§ 269-7(a), 269-17 and 269-19, to the extent applicable, are waived with respect to the

including Petitioner, as a basis for not filing an application or petition regarding similar transactions that fall within the purview of these statutes.

¹²We also take official notice of all records relating to Petitioner, pursuant to HAR § 6-61-48.

¹³On February 9, 2005, Petitioner filed, among other things, a copy of its revised tariff filing, effective June 1, 2004, in response to the Consumer Advocate's Statement of Position. Nonetheless, copies of Petitioner's initial tariff and other revised tariff filing should also be submitted to the Consumer Advocate. For example, the record of Docket No. 99-0049 indicates several tariff filings that were not served upon the Consumer Advocate.

Proposed Financial Transactions, described in Petitioner's Petition, filed on December 9, 2004.

2. HAR §§ 6-61-101 and 6-61-105 filing requirements, to the extent applicable, are waived.

3. Within thirty (30) days of the date of this Decision and Order, Petitioner shall file with the Consumer Advocate two (2) copies of the initial tariff filed in Docket No. 99-0049 and any revised tariff submitted thereafter. Failure to adhere to the commission's orders shall constitute cause to void this Decision and Order, and may result in further regulatory actions, as authorized by law.

DONE at Honolulu, Hawaii FEB 28 2005.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By Wayne H. Kimura
Wayne H. Kimura, Commissioner

By Janet E. Kawelo
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

Kris N. Nakagawa
Kris N. Nakagawa
Commission Counsel
04-0356.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21661 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
Honolulu, HI 96809

RICHARD M. RINDLER, ESQ.
MICHAEL P. DONAHUE, ESQ.
BRIAN MCDERMOTT, ESQ.
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007-5116

Attorneys for LEVEL 3 COMMUNICATIONS, LLC



Karen Higashi

DATED: FEB 28 2005